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IN THE

Supreme Court of the United States

October Term, 1970
No. 1509

STATE OF CALIFORNIA,

Petitioner,

vs.

CLENNON WASHINGTON KING,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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IN THE

Supreme Court of the United States

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STATE OF CALIFORNIA,

Petitioner,

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CLENNON WASHINGTON KING,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The State of California respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on October 2, 1970.

Opinions Below

The unreported decision of the Court of Appeal rendered on September 13, 1967, in Case No. 4th Crim. 2849 affirmed respondent's conviction. A certified copy of the unreported decision is filed with this Court. The opinion of the California Supreme Court reducing respondent's conviction from a felony to a misdemeanor, rendered on October 2, 1970, is reported as *In re King* (1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P. 2d 983. A certified copy of said decision is filed with this Court and will hereinafter be cited as "Decision."

Jurisdiction

The opinion of the California Supreme Court issued on October 2, 1970. A petition for rehearing was denied on October 28, 1970. On January 15, 1971, an order was entered extending the time for filing the petition for writ of certiorari to and including March 27, 1971. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. section 1257(3) and Rule 22 of the Rules of the Supreme Court of the United States, since the validity of a state statute has been drawn in question and a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented

1. Do statutory provisions making the misdemeanor of willful nonsupport a felony when committed by an offender who simultaneously remains outside the territorial boundaries of the State of California for a period in excess of 30 days deny equal protection of the laws by imposing an invidious discrimination against the federal right to travel?

2. Do statutory provisions making the misdemeanor of willful nonsupport a felony when committed by an offender who simultaneously remains outside the territorial boundaries of the State of California for a period in excess of 30 days abridge the privileges and immunities of citizens of the United States and of the several states?

Statutes Involved

The Constitutional and statutory provisions are set forth in the Decision. They are as follows:

United States Constitution, Fourteenth Amendment;
United States Constitution, article 4, section 2;
California Penal Code section 270.

History of the Case

In an information filed by the District Attorney of San Diego County, respondent was charged with willful failure to provide for minor children in violation of section 270 of the California Penal Code. The information further alleged that during the period of said failure to support, respondent remained out of the state for more than 30 days. [Cl. Tr. p. 1.][1]

Respondent and all counsel waived trial by jury. [Cl. Tr. p. 22.] The court found respondent guilty as charged in the information. [Cl. Tr. p. 23.] Pursuant to section 1203.03 of the California Penal Code, respondent was temporarily placed for a period not to exceed 90 days with the Department of Corrections for observations and examination. [Cl. Tr. p. 13.] Following said commitment and examination, respondent was returned to the trial court. [Cl. Tr. p. 14.]

Respondent was sentenced to the state prison for the term prescribed by law, sentence to run consecutively with respect to any prior and incomplete sentences. [Cl. Tr. pp. 15, 25.] Respondent appealed from the judgment of conviction.

In an appeal to the Fourth Appellate District, respondent's conviction was affirmed. *People v. King*, 4th Crim. 2849 (1968). Respondent's petitions for writ of habeas corpus in the Superior Court of San Luis Obispo County and in the Second Appellate District, Court of Appeal, State of California, were both denied. Pursuant to respondent's petition for writ of habeas corpus, the California Supreme Court rendered its de-

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[1]Cl. Tr. refers to the Clerk's Transcript of the proceedings in the Superior Court of the County of San Diego in and for the State of California. A certified copy of said transcript is filed with this Court.

cision on October 2, 1970, reducing respondent's conviction from a felony to a misdemeanor on the ground that the felony provisions of section 270 of the California Penal Code conflict with the federal right to travel from one state to another and resultantly deny equal protection of the laws under the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 13, of the California Constitution. (*See* Decision pp. 2, 7, 10-11.)

Factual Statement

Ann L. King married respondent in 1951, and subsequently had six children by him. [Rep. Tr. pp. 17-18.][2] Respondent and his family moved from the State of Georgia to Compton, California, sometime in 1957 or 1958. [Prel. Tr. pp. 14-15.][3]

In November 1959, respondent and his family, taking their personal belongings, moved to Mexico. [Prel. Tr. p. 16.] According to respondent, the exact date was November 27, 1959. [Rep. Tr. p. 53.] At Rosarita Beach, Mexico, respondent and his family rented a room in a motel. Respondent then left his family, not indicating where he was going. Respondent's wife went to the international border between the United States and Mexico in search of respondent. Because she was

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[2]Rep. Tr. refers to the Reporter's Transcript of the proceedings of the Superior Court below. A certified copy of this transcript is filed with this Court.

[3]Prel. Tr. refers to the transcript of the Preliminary Hearing held in the Superior Court below and on which the decision of the California Supreme Court was in part based. A certified copy of this transcript is filed with this Court.

running short of money, she then returned to California with the children and sought welfare assistance from San Diego County. [Prel. Tr. pp. 17-18.]

After respondent's disappearance, respondent's wife did not see him again until approximately July 1, 1960. At that time respondent appeared in San Diego, took one of the children, and went to Tijuana, Mexico. Respondent's wife followed him. After an altercation, respondent was arrested by Mexican authorities in Tijuana, Mexico, and Mrs. King returned to San Diego. [Rep. Tr. pp. 18-19.] Two days later Mrs. King again saw respondent when he drove back to her home in a rented car. Mrs. King called the police, but by the time they arrived, respondent was gone. This incident was the last she saw of respondent until the preliminary hearing. [Rep. Tr. pp. 19-20.]

Following the separation, Mrs. King worked most of the time in an attempt to support the children. However, it was necessary for her to receive public assistance almost continuously.

The records of the Department of Public Welfare reflect that since July 10, 1960, respondent has made no payments in support of his minor children. [Rep. Tr. p. 25.] During the period between the separation in December 1959 and respondent's conviction, she received no support whatsoever from respondent for the support of the six minor children. During this time she received letters from respondent. He asked her to send him clothes and other miscellaneous items. Respondent, who holds a bachelor's and master's degree, is a qualified school teacher. [Rep. Tr. pp. 21-22.]

After respondent left California in 1960, two efforts to obtain support through the Uniform Reciprocal Support Act failed. Respondent was arrested in Hawaii in 1961, but following the trial he fled to California. In January 1963 respondent was arrested in Miami, Florida. Respondent was ordered to pay $25 a week, but no payments pursuant to this order were made. Respondent was arrested in Chicago, Illinois, on May 22, 1966, for nonsupport. He waived extradiction and was brought to California. [Ex. 5.][4]

[4]Exhibit 5 refers to respondent's probation and supplemental probation reports in the Superior Court below and which were part of the record in the proceeding now under review. A true copy of each of said reports is filed with this Court.

ARGUMENT

I

The Decision of the California Supreme Court That the Felony Provisions of Section 270 of the California Penal Code Violate Equal Protection of the Laws Is Clearly Posited on a Misconception of the Federal Right to Travel, as Articulated by This Honorable Court in Recent Decisions, and Thus Presents a Substantial Federal Question

The decision of the California Supreme Court of which petitioner is seeking review invalidates the statutory provisions in question purportedly on the basis of State constitutional provisions. The decision states:

> "We hold that insofar as the section punishes nonsupporting fathers who 'remain out of the state for 30 days' more heavily than nonsupporting fathers who are within [the state], this penal provision establishes a classification not sufficiently related to any legitimate governmental objective, and as such violates the equal protection clause of our Constitution." (Emphasis added.) (Decision p. 2.)

The *true basis* of the decision is found in the words "not sufficiently related to any legitimate governmental objective," which pertain to respondent's main contention and to which the opinion directs itself at a later point in the case.

> "The state contends that it has a legitimate interest in facilitating the enforcement of the support obligations of section 270 . . . Such a purpose—to require individuals to move or remain in California—lacks constitutional sanction because it

> violates the individual's constitutional right to choose his own domicile and to travel freely throughout the country."

The court went on to cite as authority the recent cases of *United States v. Guest,* 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), and *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). (Decision pp. 10-11.)

The decision recognizes that the principle embodied in the equal protection concept "does not preclude the state from drawing any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose." The decision nevertheless *concedes* the existence of an "arguable rational relationship" between the statutory provisions in question and the enforcement of support obligations. The statute is said to be invalid because it infringes on the federal right to travel. (Decision p. 7.)

Thus it appears that the decision in this matter was not based on an independent state ground, but was *compelled* by the California Supreme Court's own, it is submitted, erroneous concept of the federal right to travel. If the state court materially bases its decision on a determination of the federal question, this Honorable Court has indicated that it will review the case even though the state court ostensibly based its decision upon an adequate state ground. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 290, 2 L. Ed. 1313, 78 S. Ct. 1174 (1958).

> "[W]here the non-federal ground is so interwoven with the other as not to be an independ-

ent matter, or is not of sufficient breadth to sustain the judgment without any decision of the [federal ground], our jurisdiction is plain. [Citations.] And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. [Citation.]" *Enterprise Irrig. Dist. v. Canal Co.*, 243 U.S. 157, 164, 37 L. Ed. 318, 61 S. Ct. 644 (1917).

II

Those Provisions of Section 270 of the California Penal Code Making the Misdemeanor of Willful Nonsupport a Felony When the Offender Simultaneously Remains Out of the State Territorial Boundaries for a Period in Excess of 30 Days Is Not an Invidious Discrimination Denying Equal Protection of the Laws, Since the Provisions Are Not a Penalty on the Right to Travel and, Furthermore, Are Based on a Rational and Compelling State Interest

A. The California Supreme Court Misconceived the Purpose of the Felony Provisions of Section 270 of the California Penal Code, Which Provisions Are Necessary to the Effective Enforcement of Nonsupport Laws Through Increased Deterrence and the Facilitation of Extradition of Offenders Who Remain Outside the Territorial Boundaries of State for the Proscribed Period of Time

The decision of the California Supreme Court reasoned that the "criminal quality" of the father's nonsupport was no greater when committed while the father was outside the state rather than inside the state. The decision further reasoned that the "valid general purposes" of the nonsupport statute had no relationship

to the location of the nonsupporting father.[5] (Decision p. 7.) In support of its reasoning, the decision cited the case of *People v. Jones,* 257 Cal. App. 2d 235, 238-39, 64 Cal.Rptr. 622 (1967), where it was stated:

> "Discrimination *solely* on the basis of location inside or outside of the state bears no more relation to the punitive and deterrent purposes of section 270 than differing locations of nonsupporting fathers within this state."

Petitioner submits that this reasoning is entirely incorrect. The greater punishment applies to circumstances under which a *greater deterrent* is necessary to prevent the commission of the crime. Secondly, the felony provisions facilitate the enforcement of the nonsupport provisions against fathers remaining outside the state by enhancing the chances for successful extradition.

The greater deterrent is necessary because fathers who are outside the territorial boundaries of the State of California are not amenable to California state process and must be extradited. It would be attributing undue naivete to delinquent fathers to argue that they are not aware of the existence of this law enforcement problem. When a father inside the state is willfully failing to support his children, he can be immediately arrested and prosecuted. On the other hand, the act of a father in remaining out of the state for a substantial period of time makes enforcement of support obligations unsatisfactory, if not a practical impossibility.

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[5]In raising this point, the California Supreme Court misunderstood petitioner's argument. The general purposes of the nonsupport statue were raised in support of the contention that they constituted a *compelling state interest.* This contention will be dealt with in a subsequent portion of this petition.

See Commissioners' Prefatory Notes to 1950 Act, Uniform Reciprocal Enforcement of Support, 9C Uniform Laws Annotated 3. Even after enactment in a substantial number of states of the Reciprocal Enforcement of Support Act, the increasing mobility of our society continues to make enforcement of support obligations for minor difficult. *See* Note, 48 Cornell L. Q. 541. Thus, it is probable that the Legislature of the State of California considered that a father outside the territorial boundaries of California might be more reluctant to take advantage of his location with respect to his support obligations when his offense is a felony rather than a misdemeanor.

Furthermore, when the father is not deterred, the felony provisions aid law enforcement by facilitating what has been referred to as the complicated and inefficient process of extradition. *United States v. Brandenburg,* 144 F.2d 656, 659 (3d Cir. 1944). Extradition of offenders who are not present in the demanding state at the time that the offense is committed are not "fugitives" under the federal constitutional and statutory provisions relating to extradition. Nevertheless, states are not limited to granting extradition under circumstances more broad than the constitutionally compelled duty. Thus, the Uniform Criminal Extradition Act, enacted by the great majority of the states, provides for the discretionary extradition of offenders who are not fugitives. *Criminal Extradition,* 9 Uniform Laws Annotated 294; *In re Cooper,* 53 Cal. 2d 772, 775-76, 3 Cal. Rptr. 140, 349 P. 2d 956 (1960), *appeal dismissed and cert. denied,* 364 U.S. 294, 5 L. Ed. 2d 83, 81 S. Ct. 104; *People ex rel. Waldman v. Ruthazer,* 2 Misc. 2d 297, 144 N.Y.S. 2d 429, 430 (1955).

The important feature to note regarding extradition under state laws similar to section 6 of the Uniform Criminal Extradition Act is that the decision to extradite is in the *discretion* of the governor. Under federal constitutional and statutory provisions, extradition is a duty. Realistically, the executive authority exercising this discretion will be influenced by the knowledge that the demanding state considers the offense committed to be a felony rather than a misdemeanor. Thus, making the offense of willfully failing to support minor children while beyond direct amenability to state process a felony facilities extradition as well as detering the commission of the offense originally.

Notwithstanding the foregoing, petitioner takes sharp issue with the view that the *criminal quality* of the out-of-state offender is no more serious than the father who remains in the state while failing to support his minor children. Because the father who remains out of the jurisdiction is not amenable to state process, the hardship and the deprivation which he has inflicted on his minor children is thereby prolonged. The reasons for his being outside the state's territorial boundaries bear no realtionship whatsoever to the degree of the deprivation to his dependent minors. The minor children are no less deprived when the father is unamenable because he is on a business trip, on an extended vacation, or residing permanently outside the state's territorial boundaries. *Differences in circumstances* resulting in different degrees of harm from criminal conduct are properly the basis of differing penalties. *Skinner v. Oklahoma,* 316 U.S. 535, 540, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942).

Therefore, the felony provisions of section 270 of the California Penal Code have as their basis deter-

rence of offenses under the circumstances to which they apply, enforcement of those provisions, and a criminal quality of conduct warranting a more severe punishment.

B. The Felony Provisions of Section 270 of the California Penal Code Do Not Penalize the Federal Right to Travel, Since the Claimed Interference Is in Fact Illusory and Since Said Provisions Apply Only to Criminal Offenders Who Are Subject to Prosecution by the State of California

The decision by the California Supreme Court that the felony provisions of section 270 of the California Penal Code violates the federal right to travel proceeds on the theory that these provisions encourage nonsupporting fathers to "move to, or remain in, California." Petitioner did not argue before the California Supreme Court, and is not arguing now, that it was the purpose or effect of the felony provision to "encourage"[6] fathers to move to California to avoid being prosecuted for a felony.

An analysis of this hypothetical interference with the right to travel will show that the interference is *in fact nonexistent*. If the nonsupporting father moves to California to avoid being prosecuted for a felony and at the same time resumes supporting his family, no compulsion to come to California exists, for the father is no less secure from prosecution by simply commencing his support without moving to California. Only where the father moves to California to avoid being prosecuted for a felony and at the same time continues his offense of nonsupport would the act of moving to

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[6]Petitioner wishes to point out that at no time did petitioner use the word "encourage" with respect to absent fathers *moving to California*. Petitioner did argue that the felony provisions "encourages" absent fathers to fulfill their *support obligations*.

California cause the father to be prosecuted for a misdemeanor instead of a felony. Such a possibility is so remote that it is hardly worthy of remark, much less of the basis for a constitutional holding. It would be an eccentric nonsupporting father indeed who, while continuing his unlawful conduct, would feel compelled to move to California, where he would be amenable to direct process and subject to immediate prosecution.

Petitioner submits that the hypothetical interference with the right to travel on which the decision is based is trivial if not totally illusory. The truly realistic evaluation of the function of the felony provisions of section 270 of the California Penal Code, however, is that the less eccentric nonsupporting father will choose to commence his support obligations rather than risk being extradited and prosecuted for the felony.

Assuming the existence of some limitation on movement from one state to another, not all such limitations are unconstitutional *penalties* on the right to travel. This Court stated in its recent decision in *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1332 (1969):

> "We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S at 638 n. 21.

The felony provisions under consideration do not apply to a class of persons outside the State of Cali-

fornia who are engaged in lawful conduct, but do apply only to a class of persons who are at that time engaged in a criminal offense. It is the weight of authority and the better reasoned view that the nonsupporting father can be tried and convicted in a state in which he knowingly permitted his child to remain in destitute and necessitous circumstances, even though the father was not present in the state at the time of the occurrence. *Commonwealth v. Booth,* 266 Mass. 80, 165 N.E. 29, 31 (1929); 23 Ops.Cal.Atty.Gen. 210; *Jurisdiction and Venue of Criminal Charge for Child Desertion for Nonsupport as Affected by Nonresidence of Parent or Child,* 44 A.L.R. 2d 886, 899-901. As such an offender, the nonsupporting father is subject to extradition whether the offense be a misdemeanor or a felony. *Ex parte Mendoza,* 408 S.W. 2d 926, 928 (Tex. Cr. App. 1966).

Inasmuch as the nonsupporting father is subject to extradition for his offense, the exercise of his constitutional right to travel by refusal "to move to, or remain in, California" is by this fact alone sharply curtailed. The felony provisions of section 270 of the California Penal Code do not increase this curtailment but increase only the curtailment's effective enforcement.

Finally, it must be noted that the situation presented in this case is distinguishable from the situation present in *Shapiro v. Thompson, supra.* In the *Shapiro* case, the class of persons subject to the disability were welfare recipients. As such they were engaging in lawful conduct in seeking welfare benefits. The provisions involved in this case apply to a narrow class of persons, criminals, who at the time are engaged in unlawful conduct.

Therefore, the felony provisions of section 270 of the California Penal Code do not constitute an abridgment of the right to travel since their claimed abridgment is illusory. They do no more than facilitate the enforcement of an already existing limitation on that right and are aimed only at a narrow class to promote a legitimate state interest, the encouraging of support of minor children by fathers who are outside the territorial boundaries of the State of California.

C. The Felony Provisions of Section 270 of the California Penal Code Do Not Constitute an Invidious Discrimination Against a Person Exercising the Right to Travel, Since the Provisions Are Necessary to the Enforcement of Laws Designed to Promote a Compelling State Interest, the Prevention of Harmful Effects on Children Not Properly Supported by Their Fathers

In arguing that the "valid general purposes" of protecting children from the harmful effects of nonsupport do not furnish a valid basis for the felony-misdemeanor classification (Decision p. 9), the California Supreme Court completely misconceived the nature of petitioner's argument. It is petitioner's argument that *if* the felony provisions do constitute in any way an abridgment of the right to travel, this abridgment is justified by a compelling state interest. As petitioner stated in its Return to the Order to Show Cause on respondent's Petition for Habeas Corpus:

> "This compelling state interest is the protection of the welfare of children by requiring parents to provide support without the children having to become public charges. The interest of the state in

requiring parental support is not a mere matter of fiscal integrity. The state is concerned with the adverse impact of being a public charge on a child's growth and development, on his education and well being. This relationship between proper parental support and the child's welfare was recognized in an early California case, In re Mitchell, 19 Cal. App. 567, 48 A.L.R. 1193, 1194, in which the court stated:

> " 'Indeed, the provisions of section 270 in réality merely represent, as to the subject to which it relates, the crystallization of the power of police, under and by virtue of which the state is authorized to make all manner of reasonable and wholesome rules controlling and regulating the individual behavior of people in their intercourse with each other and toward society and government. . . . In the last analysis, the supreme purpose of all government is to promote and maintain the happiness of mankind, and the very first step to that end is the giving of such care and attention to infancy as that it may be developed and nurtured into sterling man and womanhood.' In re Mitchell, supra, at 571-72. See also People v. Sorensen, supra, 68 Cal. 2d 280, 287."

This argument by petitioner was misconceived by the California Supreme Court as an argument that the purposes behind the statutory provisions in question was preservation of fiscal integrity, which argument, in view of the *Shapiro* decision, petitioner never made. It should be pointed out that the California Supreme Court never reached this crucial issue as to compelling

state interest. In a footnote to the decision the Court said:

> "Inasmuch as section 270 serves to penalize the exercise of defendant's fundamental constitutional right to travel, its classification scheme could of course only be justified by a showing that the provision is 'necessary to promote a *compelling* governmental interest.' (Shapiro v. Thompson, 394 U.S. 618, 634; cf. Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 784-785.) Since we find that the basic objective of the felony provision—to induce nonsupporting fathers to come to California—is not a constitutionally legitimate one, we have no occasion to apply the compelling governmental interest test in the instant case." (Decision pp. 14-15 n. 7.)

This conclusion that the felony provisions have no constitutionally legitimate objective circuitously falls back on the conclusion that the "arguable rational" objective was in violation of the federal right to travel. (*See* Argument I.) But as heretofore pointed out, *even if* in fact such an interference with the right to travel does exist by the felony provisions, such provisions can nevertheless be justified in the presence of a compelling state interest. Because of the circuitous reasoning employed in the decision, the court below never reached this issue.

In a time where the environment in which children are raised is considered of great importance, what more compelling interest can exist than the interest of the state in preventing minor children from being subjected to the harmful and adverse impact both of deprivation of their rightful support and of becoming public charges?

D. Since the Statutory Classification Is Based Upon a Rational Scheme Designed to Cope With Different Circumstances Existing Within Each Class, Respondent Was Not Denied Equal Protection of the Laws

The ultimate conclusion reached by the decision of the California Supreme Court was that the classification allegedly based on the offender's residence and nonresidence in the state, was not rational. At the outset it should be pointed out that the classification under consideration is not in fact based upon residence and nonresidence. The classification is defined by *absence* from the territorial boundaries of the State of California without regard to the reasons for the absence. *Thus, it applies to a resident of California* who goes on a 30-day business trip or a 30-day vacation. It would also include nonresidents, since the difficulty of enforcement against those persons is no less severe than against California residents who remain out of the state.

The true basis of the classification is the differing circumstances relating to the deterrence of the crime of nonsupport and the effective enforcement of the nonsupport statute. The legislature of a state "may mark and set apart . . . classes and types of problems according to the needs . . . as dictated or suggested by experience." *Skinner v. Oklahoma,* 316 U.S. 535, 540, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942). The equal protection clause is not a demand that a statute necessarily apply to all persons and does not require things which are different in fact to be treated in law as though they were the same. "Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi v. Yeager,* 384 U.S. 305, 309, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966).

In holding that the classification under consideration was unreasonable, the court below constructed a hypothetical case in which it conceived that the classification "may often lead to what appears to be fortuitous, and even arbitrary, results." (Decision p. 8.) However, it has been said that "lack of equal protection is found in the *actual existence* of an invidious discrimination [citations], not in the mere possibility that there will be like or similar cases which will be treated more leniently." *Queenside Hills Co. v. Saxl,* 328 U.S. 80, 84-85, 90 L. Ed. 1096, 66 S. Ct. 50 (1946).

The resort by the court below to a hypothetical situation may have been attributable to the fact that the court below could not use respondent's case as an example. Petitioner argued before the court below that respondent had no standing to contend that his rights as a "nonresident" were infringed by the felony provisions under consideration. (*See* Decision pp. 16-17 n. 9.) The record was clear that at the time that respondent deserted his family, they had not established a domicile in Mexico. Therefore, at that time their domicile remained in California. Furthermore, as a practical matter, respondent virtually placed his family in California by abandoning them under circumstances where returning to California was their only conceivable choice. In reality, respondent never severed his ties as a resident of California at the time he left his family. [*See* Rep. Tr. p. 34.] The court refused to reach the resolution of the standing issue on the basis that "there [is] still no showing that the avoidance of his support obligations was a dominant purpose of defendant's departure from the state" and that "in any event, since we conclude that the state cannot be so construed, we need not resolve these contentions." (Decision p.

17 n. 9.) Thus, the Supreme Court concluded that it was unnecessary to decide whether respondent was a nonresident, because the statute could not be construed as applying to persons who leave the state for "a dominant purpose" of the avoidance of support obligations. Petitioner submits the conclusion is a nonsequitur. If respondent was still a resident of California at the time that he abandoned his children, respondent cannot argue that he is the victim of discrimination as a *nonresident* no matter how broad or narrow the provisions of the statute.

The opinion of the California Supreme Court expressed a view that the distinction based on geographical locality within as opposed to without the territorial boundaries of the State of California was of no significance. A number of state court decisions have held that classifications based on differing circumstances within different geographical localities do not deny equal protection. *State v. Guidry,* 247 La. 631, 173 S. 2d 192, 195 (1965); *State v. Gilmore,* 236 Or. 349, 388 P. 2d 451, 455 (1964); *People ex rel. Kipnis v. M'Cann,* 199 App. Div. 30, 191 N.Y.S. 574, 580 (1921). Thus, for instance, a state may impose a more severe punishment on the illegal importation of alcoholic beverages than on the illegal transportation within the state, since the degree of harm and difficulty of enforcement varies in each instance. *Hayes v. United States,* 112 F.2d 417, 421 (10th Cir. 1940). The decision of the California Supreme Court takes the view that the classification under the felony provisions of section 270 of the California Penal Code is based on nonresidency. Such is not the case. The additional penalty applies to all persons who remain out of the State of California for the proscribed pe-

riod, irrespective of their actual residency. Thus, if a resident of California remains out of the state for 30 days, he is as guilty of a felony as is a nonresdient who does so. Nevertheless, the principle that classifications based on differing circumstances do not deny equal protection is equally applicable to classifications distinguishing between residents and nonresidents. In the case of *District of Columbia v. Brooke,* 214 U.S. 138, 53 L. Ed. 941, 29 S. Ct. 560 (1909), this Court stated:

> "The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, non legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. . . ." 214 U.S. at 150.

Petitioner submits that the court below in its analysis failed to take into consideration the differing circumstances with respect to persons inside the State of California and outside the State of California. Instead, the court below treated nonsupporting fathers "abstractly as human beings" and not in regard to "the power to reach one and not the other." The decision in the *Brooke* case was clearly founded upon the considerations of law enforcement. As subsequently stated, in the *Brooke* case:

> "The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to pre-

> serve the health of the city. There is a *difference only in the manner of enforcing it,* a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification. . . ." (Emphasis added.) 214 U.S. at 151.

Although in the present case the classifications are not based on residency, but are based on absence from the state by any person, nevertheless the considerations which would justify a classification based on residency also justify the classification in the present case.

III

The Felony Provisions of Section 270 of the California Penal Code Do Not Infringe on the Privilege and Immunities of Citizens of the Several States or of the United States Since the Provisions Are Not a Penalty on the Right to Travel and, Furthermore, Are Not Based on Citizenship but on a Valid Independent Reason

As heretofore argued, the classifications under the felony provisions of section 270 of the California Penal Code are not based on a distinction between residency and nonresidency. Neither is residence necessarily equivalent to citizenship, the basis of the privileges and immunities clauses of article IV, section 2, and the Fourteenth Amendment of the United States Constitution. *La Tourette v. McMasters,* 248 U.S. 465, 469-70, 63 L. Ed. 362, 39 S. Ct. 160 (1919). Nevertheless, the distinction between the terms does not permit a discrimination against nonresidents which has the

necessary effect of discriminating against citizens of other states. The question is whether there is a reasonable ground for the diversity of treatment to residents and nonresidents. *Travis v. Yale & Town Mfg. Co.*, 252 U.S. 60, 79, 64 L. Ed. 460, 40 S. Ct. 228 (1920).

Even if the classification in this case were founded on either residency or on citizenship as such, the valid independent reasons of facilitating law enforcement and deterring crime heretofore explained are sufficient to sustain the classification. In the case of *Toomer v. Witsell,* 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1157 (1948), *rehearing denied,* 335 U.S. 837, 93 L. Ed. 389, 69 S. Ct. 12 (1948), this Court stated with respect to the privileges and immunities clause of article IV, section 2, of the Constitution:

> "It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." 334 U.S. at 396.

Furthermore, with respect to the right to travel, this Court has declined to attribute the existence of the right to travel to either the privileges and immunities clauses or the equal protection clause. *Shapiro v.*

Thompson, 394 U.S. 618, 630, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). As heretofore argued, the felony provisions of section 270 of the California Penal Code do not interfere with the right to travel and therefore do not violate the equal protection clause. Petitioner submits that these provisions do not violate the privileges and immunities clauses for the same reasons.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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